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NO. 97 [redacted]

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, A. D. [redacted] 1969

CHARLES BUSSIE,

Petitioner,

VS.

STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

CHARLES B. EVINS, R. EUGENE PINCHAM
EARL E. STRAYHORN,
840 East 87th Street, Chicago, Illinois
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Attorneys for Petitioner

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

CHARLES BUSSIE, Petitioner, prays that a Writ of Certiorari issue to review a judgment of the Supreme Court of the State of Illinois affirming Petitioner's conviction of unlawful sale of a narcotic drug in the Circuit Court of Cook County, Illinois, County Department, Criminal Division.

CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Illinois is reported in _____ Ill. 2nd _____, 243 N. E. 2nd 196 , and is attached as Appendix "A" hereto.

No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1958

CHARLES RUSSIE,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI
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CITATIONS TO OPINION BELOW

The opinion of the Supreme Court of Illinois is reported in Ill. 2nd ____, 2 Ill. 2nd 283, N.E. 2nd 190, and is attached as Appendix "A" hereto.

JURISDICTION

The Judgment and Order of the Supreme Court of Illinois was entered on November 22, 1968 (APP. A). The Petion for Re- Hearing was denied on January 28, 1969,(App. B.) The jurisdiction of this Court is invoked under Tit. 28 U. S. C. Section 1257 (3).

QUESTIONS PRESENTED

1

Does substantial prejudice occur to a defendant and is fundamental due process violated and a defendant's Sixth Amendment Constitutional right to be tried by an impartial jury abridged when in his trial on consolidated indictments the Trial Court admits illegally obtained evidence as to one indictment, which illegal evidence when considered by the Jury could lead to an inference of defendant's guilt as to the other indictment, and in his instructions to the Jury the Trial Court mis-states the law in a manner which left the Jury no other alternative than to enter a finding of guilty?

2

Does substantial prejudice occur to a defendant and is a defendant denied equal protection of the laws when an Appellate Court holds that where in his trial on consolidated indictments illegally obtained evidence is admitted against him and the Court mis-states the law in his instructions to the Jury that such compound errors is merely harmless error and that no substantial prejudice resulted to the defendant?

STATEMENT OF THE CASE

In June, 1965, the Petitioner, CHARLES BUSSIE, was indicted under two indictments by the Cook County Grand Jury charging him with unlawful sale and unlawful possession of narcotic drugs. Prior to trial, Petitioner's pre-trial motion to suppress narcotics recovered from his home discovered when the police through a forcible entry, in the absence of the petitioner, conducted a search of petitioner's home was denied. Thereafter, the two indictments were consolidated for trial and the petitioner was tried by a jury.

In his trial on the consolidated indictments, The People, over objection of petitioner, were permitted to introduce the marijuana recovered by the police as a result of their warrantless search after their forcible entry into petitioner's vacant apartment in petitioner's absence, as evidence against him on the indictment charging unlawful possession of a narcotic drug.

The trial court in his instructions to the jury charged the jury:

> "The Court instructs the jury that necessary force may be used to enter a dwelling unit when a state officer reasonably believes that entry to such dwelling unit is necessary to arrest a person whom he reasonably believes has committed a crime; to prevent such person from escaping; to discover the fruits of the crime or articles which may constitute evidence of an offense."

and

STATEMENT OF THE CASE

"The Court instructs the jury that anyone who agrees, concerts, or in any manner offers to unlawfully sell or dispense narcotic drugs to any person or negotiates to have any narcotic drug unlawfully sold, dispensed, or given commits the offense of sale of a narcotic drug."

Each of the instructions quoted herein was objected to by petitioner.

The Jury found petitioner guilty on each indictment and the Court imposed judgment on the verdicts by sentencing petitioner to a term of 10 to 12 years for the unlawful sale and 2 to 5 years for the unlawful possession, the sentences to run concurrently.

On appeal the Supreme Court of Illinois reversed the conviction as to the unlawful possession of a narcotic drug and affirmed the conviction of unlawful sale. The Supreme Court ruled that the trial court erred in its denial of petitioner's pretrial motion to suppress the evidence seized in the warrantless search of petitioner's home in his absence. The Court consequently ruled that petitioner's conviction of the unlawful possession indictment could not stand and reversed.

On the question of the erroneous instruction as to the unlawful sale the Supreme Court ruled that the instructions complained of:

"The Court instructs the jury that anyone who agrees, conceals, or in any manner offers to unlawfully sell or dispense narcotic drugs to any person or negotiates to have any narcotic drug unlawfully sold, dispensed, or given constitutes the offense of sale of a narcotic drug."

Each of the instructions quoted herein was objected to by petitioner.

The jury found petitioner guilty on each indictment and the Court imposed judgment on the verdicts by sentencing petitioner to a term of 10 to 12 years for the unlawful sale and 2 to 5 years for the unlawful possession, the sentences to run concurrently.

On appeal the Supreme Court of Illinois reversed the conviction as to the unlawful possession of a narcotic drug and affirmed the conviction of unlawful sale. The Supreme Court ruled that the trial court erred in its denial of petitioner's pretrial motion to suppress the evidence seized in the warrantless search of petitioner's home in his absence. The Court consequently ruled that petitioner's conviction of the unlawful possession indictment could not stand and reversed.

In the question of the erroneous instruction as to the unlawful sale the Supreme Court ruled that the instruction complained of

"***mis-states the law and would lead the jury to conclude that a person had comm it - ted the offense of sale of a narcotic drug even though an exchange or sale never took place. Our examination of the evidence, however, clearly indicates that a sale did take place and that the jury could reason - ably have determined that the Defendant was the seller. Based upon this evidence, therefore, we find that this instruction resulted in no substantial prejudice to the Defendant."

REASONS FOR GRANTING THE WRIT

The reason for the grant of a Writ of Certorari in this case is that petitioner by the erroneous instructions of the trial court as to the Unlawful Sale of narcotic drugs coupled with the trial court's admission of the illegally seized marijuana was denied fundamental due process in that his right to be deprived of his liberty only on the presentation of legally admissible evidence which established his guilt of the crime charged beyond a reasonable doubt was abridged.

The Illinois Supreme Court in its opinion found that the trial court erred in its instruction as to the Law of Sale. It held that the instruction mis-stated the law and "would lead the jury to conclude that a person had committed the offense of unlawful sale *** even though an exchange or sale never took place." The Court in its holding that this mis-statement of the law by the trial court was not of substantial prejudice to the Defendant because the evidence disclosed that a sale did

take place and that the jury could reasonably have determined that Defendant was seller has misapprehended the effect that this instruction had on the jury. By the giving of this instruction the jury could reach no other conclusion than the one which it did reach. The instruction was tantamount to a direction of the Court to the jury to find the Defendant guilty.

Under the circumstances of the trial of consolidated indictments the introduction of the illegally seized evidence as to the possession case and the mis-statement of the law of unlawful sale by the trial court in its instructions was like an anvil tied to the leg of a swimmer, his sinking to the bottom is ordained. So it was with the Defendant in the instant case -- by the circumstances set forth the jury's verdict of guilt was guaranteed.

None can say what weight the compound effect of the trial court's erroneous ruling as to admissibility of illegally seized evidence and its mis-statement of the law in his instructions bore in the minds of the jury in its determination of guilt. It is clearly within the realm of possibility and entirely probable that the jury made its determination of guilt on the basis of the evidence illegally seized from defendant's home. This evidence undoubtedly was the determining factor in the jury's mind.

Every accused in a criminal case has the constitutional right under the enveloping and all encompassing protective wing of due process and equal protection of the laws to have the jury

which tries him properly instructed as to the law applicable to the crime which he is charged with having committed. Inherent in the Sixth Amendment constitutional right of an accused to be tried by a jury of his peers, is the equally important and necessary right to have his jury properly instructed. Not to do so leads inalterably to a substantially prejudicial effect on any defendants' chances to a fair trial.

The two erroneous acts complained of in the instant cause are assuredly entertwined and are poisoned fruit whose poisonous seed in the minds of the jury was indeed prejudicial to the defendant.

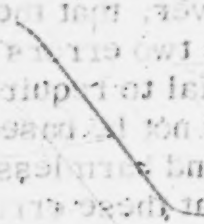
In Gordon V. United States, 344 U. S. 414, 97 L. Ed 447, 73 S. Ct. 369. this Honorable Court reversed Gordon's conviction of unlawful possession and transportation of stolen goods, at the trial the government relied principally upon a witness who in a seperate proceeding in another district had pleaded guilty to the unlawful possession of the goods. This witness on cross-examination admitted that between his apprehension and his final statement to the government which implicated the defendant he had made several statements which did not implicate him. A request for the production of these statements was denied. When this witness stated that no promises had been made to him which would influence his testimony defendant's attempt to introduce a statement made to the witness by the judge before whom he had plead guilty was denied.

This Court in reversing said, 97 L Ed 455:

> "We believe, moreover, that the combination of these two errors was sufficiently prejudicial to require reversal. ***Reversals should not be based on trivial, theoritical and harmless rulings. But we cannot say that these errors were unlikely to have influenced the jury's verdict. We believe they prejudiced substantial rights ***.

It is true and we concede that GORDON dealt with errors arising in a federal district court. We strongly urge that the principal as it applies to state court proceedings is the same. Where substantial rights of a defendant are prejudiced by errors in his trial in a state court his conviction should not be allowed to stand. It cannot here or in any forum be determined that the combined errors admittedly committed in the instant cause were not unlikely to have influenced the jury's verdict. The errors here were not harmless but substantial and clear. This cause cries out for fundamental fairness and justice. Only reversal will assuage the violation of the defendant's rights.

In U. S. V. Stevenson, _____ F 2d _____ (7th Cir) The court followed this Court's ruling in Preston v. United States, 376 U. S. 364, 11 L Ed. 2d 777, 84 S Ct. 881.



In Stevenson the defendant was arrested some nine months after a warrant had been issued for his arrest for a violation of the narcotic laws. When he was arrested a search was made of his automobile and herein was discovered. Stevenson's pre-trial motion to suppress the evidence seized in the search of his automobile was denied. Stevenson was tried before a jury on a 3 count indictment. Counts I and II charged the violation for which the warrant upon which he was arrested was issued. Count III charged the violation based upon the evidence seized in the search of his automobile. The jury found Stevenson guilty on all counts. The 7th Circuit reversed.

The Court in its opinion, handed down on April 11, 1969, stated, among other things:

> "We hold, under Preston and Harvey, that the search of Stevenson's car was unreasonable and violated his Fourth Amendment right, and that the admission of the evidence found was prejudicial and vitiated the conviction on Count III.
>
> Normally where sentences are concurrent on several Counts we sustain a conviction if valid on any of the Counts. Here, however, we think it is highly probable that Stevenson was prejudiced under Counts I and II by the introduction of the evidence to prove Count III. We think, in fairness, the three convictions should be set aside."

In Stevenson the defendant was arrested
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When he was arrested a search was made of his
automobile and heroin was discovered. Stevenson's
defense was an attempt to suppress the evidence seized
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however, we think it is highly probable
that Stevenson was prejudiced under Counts
I and II by the introduction of the evidence
to prove Count III. We think, in fairness,
the three convictions should be set aside.

It is highly probable that Appellant here was prejudiced in the jury's mind in his sale conviction by the introduction of the illegally obtained evidence and by the mis-statement of the law in the court's instruction. In fairness, we urge that his conviction be reversed.

CONCLUSION

This court has never directly and unequivocally decided whether compound substantial errors in the trial of a defendant on consolidated indictments violate a defendant's constitutional right to equal protection of the laws and to be tried by a fair and impartial jury.

Petitioner humbly and respectfully suggests that this is a fit and proper case for this court, in the interest of fundamental fairness and due process to so hold and that the Writ should be granted.

We so pray.

Respectfully submitted:

CHARLES B. EVINS, R. EUGENE PINCHAM, EARL E. STRAYHORN
840 East 87th Street, 994-2600
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and
SAM ADAM,
134 N. LaSalle Street, 236-5543
Chicago, Illinois, 60602
Attorneys for Petitioner

It is highly probable that Appellant here was prejudiced in the jury's mind in his sale conviction by the introduction of the illegally obtained evidence and by the mis-statement of the law in the court's instruction. In fairness, we urge that this conviction be reversed.

APPENDIX 1

Docket No. 40132-Agenda 7-September 1968.
THE PEOPLE OF THE STATE OF ILLINOIS,
Appellee Vs. Charles Bussie, Appellant.

Mr. CHIEF JUSTICE SOLFISBURG delivered the opinion of the court:

Following a jury trial in the circuit court of Cook County the defendant, Charles Bussie, was found guilty, on consolidated indictments, of the unlawful sale of a narcotic drug and of unlawful possession of narcotic drugs. He was sentenced to the penitentiary for a term of 10 to 12 years for the unlawful sale and for a term of 2 to 5 years for unlawful possession, the sentences to run concurrently. He appeals directly to this court contending that the indictments under which he was charged failed to state crimes; that the court erred in failing to grant his motion to suppress evidence; and that the court erred in its instructions to the jury.

Defendant's objection to the indictments is based upon the fact that although each charge sets forth a violation of the Uniform Narcotic Drug Act (Ill Rev. Stat. 1963, chap. 38, par 22-1 et seq.), neither alleges that the violation was committed knowingly.

It is undisputed that knowledge is an essential element in the chain of proof of the crimes of possession or sale of narcotics. Here both indictments were couched in the language of the Uniform

Narcotic Drug Act and we held, in People v. Mills, 40 Ill. 2d 4, that such an indictment is sufficient even though it lacks an averment that the defendant comm itted the violation with knowledge. We noted in Mills that three sister jurisdictions which had adopted the Uniform Narcotic Drug Act prior to its adoption in Illinois have held that "knowledge or scienter is implicit in the language of the statute and thus it does not have to be alleged separately." We hold therefore that the indictments in questions are valid.

The defendant next contends that the trial court erred in denying his pretrial motion to suppress evidence relating to the charge of possession. The evidence presented by the prosecution shows that on June 24, 1965, Chicago police officers, Pates and Jamison, arranged with two informants to make a "controlled purchase" of narcotics from a suspect. One of the informants, Palmer, was then searched and found to be free of any narcotic drugs or currency. He was then given $300 in pre-recorded bills and he and the other informer, followed by the police, went to the apartment of co-defendant Samuel Banks, Banks advised the informers that, although he did not have a sufficient supply of narcotics himself, he would arrange for such a purchase from another party. The two informers and Banks then left Banks's apartment and proceeded, followed by Officers Pates and Jamison, to a building at 8141 South Maryland Street in Chicago. Palmer and Banks went into the building to the apartment where they were admitted by a man later identified by Palmer as the defendant Charles Bussie. According to Palmer's testimony, Bussie then agreed to sell Palmer 17 cans of marijuana and, after receiving Palmer's money, placed the marijuana in a paper bag.

APPENDIX 2

Narcotic Drug Act and we held in People v. Mills, 40 Ill. 2d 1, that such an indictment is sufficient even though it lacks an averment that the defendant committed the violation with knowledge. We noted in Mills that three sister jurisdictions which had adopted the Uniform Narcotic Drug Act prior to its adoption in Illinois have held that "knowledge or scienter is implicit in the language of the statute and thus it does not have to be alleged separately." We hold therefore that the indictments in question are valid.

The defendant next contends that the trial court erred in denying his pretrial motion to suppress evidence relating to the charge of possession. The evidence presented by the prosecution shows that on June 24, 1965, Chicago police officers Bates and Jamison, arranged with two informants to make a "controlled purchase" of narcotics from a suspect. One of the informants, Palmer, was then searched and found to be free of any narcotic drugs or currency. He was then given $300 in pre-recorded bills and he and the other informer, followed by the police, went to the apartment of co-defendant Samuel Banks. Banks advised the informers that, although he did not have a sufficient supply of narcotics himself, he would arrange for such a purchase from another party. The two informers and Banks then left Banks's apartment and proceeded, followed by officers Bates and Jamison, to a building at 8141 South Wabash Street in Chicago. Palmer and Banks went into the building to the apartment where they were admitted by a man later identified by Palmer as the defendant Charles Busate. According to Palmer's testimony, Busate then agreed to sell Palmer 17 cans of marijuana and, after receiving Palmer's money, placed the marijuana in a paper bag.

Palmer and Banks then left the building carrying the marijuana and proceeded to drive away in a car. The car was subsequently curbed by the police and its occupants were taken into custody and searched. A search of the automobile revealed the presence of the paper bag filled with marijuana and the absence of the pre-recorded money. Palmer was then taken back to the building on Maryland Street where he pointed out to the police the apartment where the sale had taken place. Palmer, Banks and the other informer were then taken to police headquarters.

It is not clear from the record how much time elapsed between transporting these men to headquarters and the return of the police to Bussie's apartment but they apparently returned immediately. The officers obtained no response after knocking on the door of the apartment indicated by Palmer, so they proceeded to break it down with a sledge hammer. Finding no one present, the officers conducted a search of the apartment and found a small package of marijuana. While conducting the search the officers heard some one in the hall who, upon investigation, revealed himself to be the defendant Charles Bussie. Bussie was then placed under arrest and a search of his person revealed one of the pre-recorded $10 bills. The record does not indicate whether the marijuana was found before or after the defendant Bussie returned to his apartment and he argues that the search was illegal and that the marijuana found in his apartment should have been suppressed.

APPENDIX 4

The United States Supreme Court has consistently stressed that the essential purpose of the fourth amendment is to protect individuals from unwarranted intrusions into their privacy. (Giordenello V. United States, 357 U. S. 480, 2 L. Ed 2d 1503, 78 S. Ct. 1245; Johnson v. United States, 333 U. S., 10, 92 L. Ed. 436.) Such holdings regarding the fourth amendment are, of course, applicable to Illinois through the fourteenth amendment. (Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S Ct. 1684). Because of this concern with an individual's right to privacy the courts have carefully drawn and limited any exceptions to the general rule that such a search must rest upon a search warrant. One of these exceptions, the one relied upon in this case by the State, is that a search without a warrant is valid so long as it is incident to a valid arrest. (Ker v. California, 374 U. S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623; Brinegar V. United States 338 U. S. 160 93 L. Ed. 1879; People vs. Jones, 31 Ill. 2d 240). Such searches have been deemed reasonable by the courts and evidence obtained from them has been declared admissible against the defendant. This exception to the general rule must be closely guarded, and consequently, the burden of showing that a search without a warrant was reasonable rests upon the law officers who "must justify their conduct before courts which have always been, and must be, jealous of the individual's right of privacy." (People v. Jones, p. 243.) Careful scrutiny of the record before us, however, leads us to the conclusion that the State has failed to demonstrate that the search was reasonable. As we have noted no evidence was produced which would support the State's contention that the search

of the defendant's premises occurred incidental to or contemporaneously with his arrest. The evidence shows only that, acting upon an informer's tip, police officers, forcibly entered the defendant's dwelling, searched for and discovered a package of marijuana and, at some point, placed the defendant under arrest.

While we do not question whether or not the police had probable cause to arrest the defendant, we seriously question, under the circumstances here present, the right of the police to search defendant's premises before his arrest once they had discovered that defendant was not present.

Of the many cases relied upon by the State to support such a search practically all of them involve searches following a suspect's arrest and stand for the proposition that a search may be undertaken by arresting officers following an arrest without a warrant so long as the arresting officers had reasonable grounds for believing that a criminal offense had been committed and that the person whom they sought to arrest was the person who had committed it. (See People vs. Ivory, 38 Ill. 2d 339; People vs. McCrimmon, 37 Ill. 2d 40.) Those cases cited by the State concerning searches without an arrest, moreover, are distinguishable on their facts. In People vs. Barbee, 35 Ill. 2d 407, for instance, police officers entered the home of the defendant reasonably suspecting that he had fired several shots at a police officer. The officers entered the premises without a warrant, in search of the defendant and found a stolen automobile and other merchandise hidden under a tarpaulin. We held that this evidence was

admissible against the defendant despite the lack of either an arrest or a search warrant and, further, despite his absence from the premises, on the basis that the officers were legally present on the premises and were not required to overlook a stolen car which was before them in plain view when they removed the tarpaulin in search of the defendant. In the present case, however, even assuming that the police were lawfully present in the defendant's apartment, no showing was made as to where the narcotics were found and as to whether such narcotics were in plain view or carefully hidden. Furthermore, the argument is not made that the police were searching the apartment for the defendant when the narcotics were discovered.

We conclude that in the absence of a showing that the search of defendant's premises was conducted contemporaneously with or after his arrest, or that the narcotics were discovered in a search for the defendant, the search was unreasonable and violative of the defendant's rights under the fourth and fourteenth amendments to the United States constitution. It is our opinion therefore, that the narcotics discovered as a result of this search should have been suppressed. Consequently, defendant's conviction on the charge of possession of narcotics is reversed.

Turning now to the charge of selling narcotics, the defendant argues that the trial court erred in giving the following instruction to the jury: "The court instructs the jury, that anyone who agrees, consorts, or in any manner offers unlawfully to sell, or dispense narcotic drugs to any person, or negotiates to have any

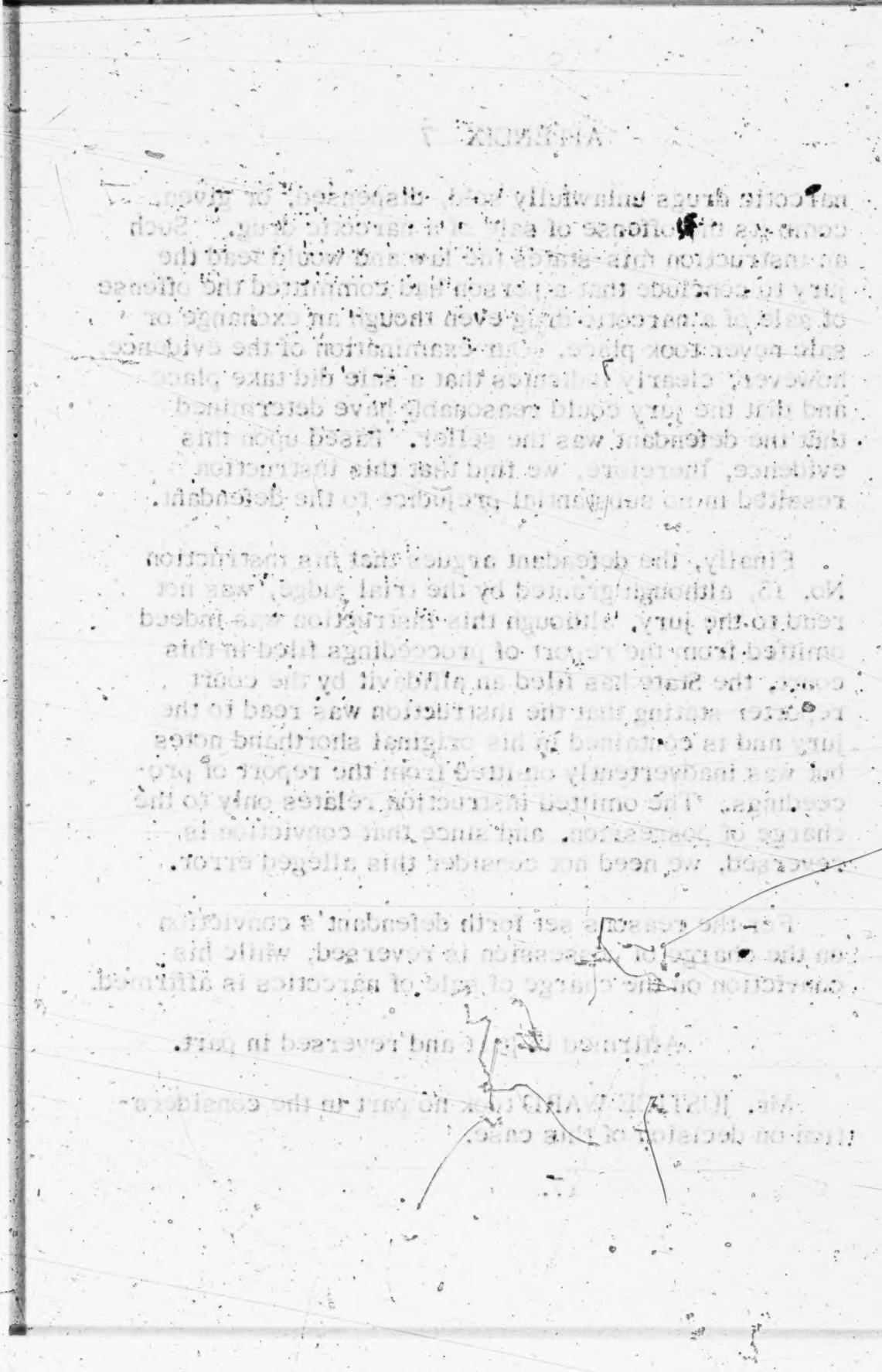
narcotic drugs unlawfully sold, dispensed, or given, comm its the offense of sale of a narcotic drug." Such an instruction mis-states the law and would lead the jury to conclude that a person had committed the offense of sale of a narcotic drug even though an exchange or sale never took place. Our examination of the evidence, however, clearly indicates that a sale did take place and that the jury could reasonably have determined that the defendant was the seller. Based upon this evidence, therefore, we find that this instruction resulted in no substantial prejudice to the defendant.

Finally, the defendant argues that his instruction No. 15, although granted by the trial judge, was not read to the jury, although this instruction was indeed omitted from the report of proceedings filed in this court, the State has filed an affidavit by the court reporter stating that the instruction was read to the jury and is contained in his original shorthand notes but was inadvertently omitted from the report of proceedings. The omitted instruction relates only to the charge of possession, and since that conviction is reversed, we need not consider this alleged error.

For the reasons set forth defendant's conviction on the charge of possession is reversed, while his conviction on the charge of sale of narcotics is affirmed.

Affirmed in part and reversed in part.

Mr. JUSTICE WARD took no part in the consideration on decision of this case.



APPENDIX B

" State of Illinois--Office of Clerk of the Supreme Court
Springfield, 62706 Justin Taft, Clerk)

January 28, 1969

Charles B. Evins
Attorney at Law
12 West Garfield Boulevard
Chicago, Illinois

Dear Mr. Evins:

In Supreme Court today, in case No. 40132 entitled:

People State of Illinois, Appellee vs. Charles Bussie, (Impleaded), appellant

Petition for rehearing was: DENIED

Very truly yours,

Justin Taft (signature)
Clerk of the Supreme Court "

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968.

NO. [redacted] 97

CHARLES BUSSIE,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

(On Petition for Writ of Certiorari to the Supreme Court of Illinois)

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM J. SCOTT,
Attorney General of the State of Illinois,
160 North La Salle Street, Suite 900,
Chicago, Illinois 60601 (346-2800).

JOEL M. FLAUM,
Assistant Attorney General,

Attorneys for Appellee.

THOMAS J. IMMEL,
Assistant Attorney General,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

NO. 1353

CHARLES BUSSIE,

Petitioner,

vs.

THE STATE OF ILLINOIS,

Respondent.

(On Petition for Writ of Certiorari to the Supreme Court of Illinois)

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Illinois Supreme Court is reported at 41 Ill. 2d 323, 243 N.E. 2d 196.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Does the admission of illegally seized evidence, which later caused reversal of the conviction on one indictment, substantially prejudice a defendant's trial on a separate and distinct indictment, where the indictments were consolidated for trial without objection by the defendant?

CONSTITUTIONAL PROVISIONS

The Constitutional provisions involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

The following is an addendum to Petitioner's Statement of the Case:

In June of 1965, the Petitioner, Charles Bussie, was indicted under two indictments by the Cook County Grand Jury, charging him with unlawful sale and unlawful possession of narcotic drugs. Petitioner's pre-trial motion to suppress evidence alleged to have been illegally seized was denied (A. 16).*

Thereafter the trial court consolidated the sale and possession charges for trial (A. 17). Petitioner's counsel stated that he had no objection to the consolidation (A. 17). The consolidation was ordered, and Petitioner was tried by a jury.

At trial, the alleged illegally seized evidence was admitted and used against Petitioner on the indictment charging unlawful possession of a narcotic drug. Relating

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*"A" refers to Petitioner's Illinois Supreme Court Abstract.

to the seizure of the narcotics, the court gave the following instructions:

> "The court instructs the jury that the right of a person to be secure in their persons and houses against unreasonable searches and seizures cannot be violated by state officers; and the home of a person charged with or suspected of committing a crime cannot, without consent, be searched without a warrant, unless such search is incident to a lawful arrest." (Petitioner Bussie's given Instruction No. 17, A. 46).
>
> * * *
>
> "The court instructs the jury that necessary force may be used to enter a dwelling unit when a State officer reasonably believes that entry to such dwelling unit is necessary to arrest a person whom he reasonably believes has committed a crime; to prevent such person from escaping; to discover the fruits of the crime or articles which may constitute evidence of an offense." (State's given Instruction No. 12, A. 46).

Petitioner did not request that the jury be instructed to consider each indictment and the evidence relating to it separately.

Petitioner was found guilty on each indictment and sentenced to a term of ten to twelve years for the unlawful sale and two to five years for the unlawful possession, the sentences to run concurrently.

After careful scrutiny of the record, the Illinois Supreme Court reversed the conviction as to the unlawful possession of a narcotic drug, and, with separate consideration, affirmed the conviction for unlawful sale. The Supreme Court ruled that the trial court had erred in its denial of the motion to suppress and consequently held that petitioner's conviction for unlawful possession could not stand.

Concerning the conviction for unlawful sale, the Court was asked to review the propriety of the following instruction:

> "The Court instructs the jury that anyone who agrees, concerts, or in any manner offers to unlawfully sell or dispense narcotic drugs to any person or negotiates to have any narcotic drug unlawfully sold, dispensed, or given commits the offense of sale of a narcotic drug." (State's given Instruction No. 13).

The Court ruled:

> "Such and instruction mis-states the law and would lead the jury to conclude that a person had committed the offense of sale of a narcotic drug even though an exchange or sale never took place. Our examination of the evidence, however, clearly indicates that a sale did take place and that the jury could reasonably have determined that the defendant was the seller. Based upon this evidence, therefore, we find that this instruction resulted in no substantial prejudice to the defendant."

The Court affirmed the sale conviction. Petition for rehearing was denied.

REASONS FOR DENYING THE WRIT

I.

PETITIONER WAS PROVEN GUILTY OF UNLAWFUL SALE OF NARCOTICS SOLELY ON THE BASIS OF CONSTITUTIONALLY ADMISSIBLE EVIDENCE, AND NO COMBINATION OF HARMLESS ERRORS OR IMPROPERLY ADMITTED EVIDENCE ON ANOTHER INDICTMENT COULD HAVE AFFECTED THE DECISION.

Petitioner, in this cause, is relying on precisely the same errors he alleged in seeking reversal in the Illinois Supreme Court. They are "the erroneous instruction of the trial court as to the unlawful sale of narcotic drugs, coupled with the trial court's admission of the illegally seized marijuana . . ." (Pet. 5)

Petitioner analogies these errors to an anvil around the leg of a swimmer. But it should be clear that due to the different proof on the two distinct charges, the error was weightless as to the conviction for sale of narcotics. This was so decided by the Illinois Supreme Court.

The issue here is whether Petitioner's guilt was established on the basis of the constitutionally admissible evidence. Petitioner was convicted of unlawful sale of narcotics pursuant to Illinois Revised Statutes, Chapter 38, sec. 22-3 (1967). The proof of the unlawful sale was established by the testimony of a police informant who had made the purchase from Petitioner. The informant had been searched at the police station before the "controlled sale" (A. 18), and given $300.00 in pre-recorded funds (A. 18). He testified to driving with another informant and a co-defendant to the address of the Petitioner. He and the

co-defendant were admitted to the apartment of the Petitioner. $300.00 was turned over to the Petitioner in exchange for 1¾ pounds of marijuana (A. 18). With a prearranged signal as they left the apartment, the informant notified surveiling police that the sale had been consummated (A. 21). After the sale, the informant and the co-defendant were searched and a bag of narcotics was found, but no money. The informant went back to the apartment with the police and showed them the location of Petitioner's apartment (A. 21). He then returned to the police station (A. 21), whereupon he immediately returned to the apartment to identify the suspect arrested by the police as none other than the Petitioner, Charles Bussie (A. 22). At the time of his arrest, Bussie was carrying a portion of the marked money on his person (A. 13-14).

It has been held many times that the testimony of a police informant who bought narcotics in a "controlled buy" was sufficient to convict a defendant of a narcotic offense. *People* v. *Merriweather,* 67 Ill. App. 2d 221, 214 N.E. 2d 593 (1966); *People* v. *Williams,* 87 Ill. App. 2d 338, 231 N.E. 2d 646 (1967). This is so even where the "buy" was made out of the vision of the police, but where an immediate arrest was made and the defendant found in possession of marked money. *People* v. *Frank,* 51 Ill. App. 2d 251, 201 N.E. 2d 197 (1964). In other words, the error in the lower court does not alter the fact that Petitioner was found guilty by competent evidence. *Sinclair* v. *United States,* 279 U.S. 263 (1929). In *United States* v. *Johnson,* 383 U.S. 169, 188 (1966) (concurring opinion), this Court noted that there are many cases where an erroneous conviction on one count does not vitiate a conviction on other counts, especially where concurrent sentences are involved, citing *United States* v. *Romano,* 382 U.S. 136 (1965); *United States* v. *Gainey,* 380 U.S. 63 (1965); *Barnard* v. *United States,* 342 F. 2d 309 (9th Cir. 1965). The Court

further noted that there are numerous cases where the issue was raised and *certiorari* denied.

In the present case the indictment for unlawful sale and the indictment for unlawful possession are so distinct that had one been defective the other would have been unaffected. The judgment as to one count might be reversed and the other affirmed. *DeJiane* v. *United States,* 282 F. 737 (3rd Cir. 1922); *United States* v. *Tuffanelli,* 138 F. 2d 981 (7th Cir. 1943).*

In the case at hand there is no indication that any evidence relating to the possession charge was used to convict for unlawful sale. For illegally seized evidence introduced at trial to deprive one of due process, there must be a showing that the challenged evidence contributed to the conviction *U.S. ex rel. Smith* v. *Nelson,* 275 F. Supp. 261 (N.D. Cal. 1967). A bold assertion of prejudice is not enough. *People* v. *Kemp,* 359 P. 2d 913 (Cal. 1961). In the *Kemp* case the appellant asserted that the jury must have been influenced by the evidence on a rape charge as it considered a murder charge. The Court rejected that argument and ruled that the mere assertion of that fact does not prove it. Petitioner here says "none can say what weight the court's erroneous ruling . . . bore in the minds of the jury in its determination of guilt" (Pet. 6). That is not so. It was clear to the Illinois Supreme Court that the illegally seized evidence substantially contributed to the conviction for unlawful possession. Hence, the reversal. But it was equally clear to the Court that the sale conviction was based on the testimony of the State witnesses; and the Petitioner has demonstrated no possible reason why the jury

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*See also: *People v. Freitag,* 336 Ill. 286, 168 N.E. 332 (1929); *People* v. *Brush,* 324 Ill. 261, 155 N.E. 34 (1927); *People* v. *Holton,* 326 Ill. 481, 158 N.E. 134 (1927).

would need or use anything other than the evidence of unlawful sale to convict for unlawful sale. Respondent contends, and it appears obvious, that the Supreme Court of Illinois was convinced, as it reviewed the record, that the conviction for unlawful sale was based on the testimony of the police informant-purchaser.

Finally, Petitioner argues that the prejudicial error which vitiated the possession conviction must be taken together with the harmless error in instructing the jury on the sale charge, and that the combined error must result in the reversal of the sale conviction. As pointed out above, there has been no showing by Petitioner how the erroneous possession conviction related to the separately proven unlawful sale. Therefore, Petitioner's efforts to "consolidate" error must necessarily fail. Further, his reliance on *Gordon* v. *United States*, 344 U.S. 414 (1953), misses the mark. There this Court held that the trial court erred in denying the request for production of certain documents and a transcript of prior proceedings, both documents to be used by the defense in an effort to impeach the same government witness. *Gordon* is factually inapposite to the case at bar.

Petitioner also relies on *United States* v. *Stevenson*, — F. 2d — (No. 16894, 7th Cir. 1969). There illegal evidence was admitted on one count of a three count indictment, all three counts having been consolidated for trial. The Court of Appeals reviewed the entire record and concluded that while they would normally sustain the convictions on the other two counts, the record demonstrated a high probability that Stevenson was prejudiced on all counts by the illegally admitted evidence. Having had no opportunity to review that record, Respondent would certainly not venture an opinion as to the propriety of the *Steven-*

son decision. However, we would point out that the *Stevenson* Court did not set down a general proposition of law, nor were they reviewing the record in *this* case. The Illinois Supreme Court, reviewing the entire record in *this* case, concluded that the inadmissible evidence had no effect on the unlawful sale conviction. The independent evidence supporting the sale conviction here is clearly set forth in the record and in the Supreme Court's opinion. That being the case, the *Stevenson* decision can hardly be said to control here.

II.

IN A TRIAL WHERE CONSOLIDATION OF TWO INDICTMENTS WAS PROPER AND WHERE COUNSEL FOR DEFENDANT EXPRESSES SATISFACTION WITH CONSOLIDATION, AND OFFERS NO JURY INSTRUCTION CONCERNING CONSOLIDATION, THE DEFENDANT CANNOT BE HEARD TO SAY THAT THE CONSOLIDATION WAS PREJUDICIAL.

Petitioner's actual reason for requesting this Court to grant a Writ of Certiorari is the prejudice allegedly caused by the consolidation of the indictments. As evidenced by the Petitioner's pre-trial motion to suppress, the threat of prejudice was known to Petitioner at the time of consolidation. Yet he did not object to consolidation, an "error" he evidently felt was non-existent throughout the trial and in all appeals heretofore. This attack on the effects of consolidation, made for the first time in this Court ,cannot be sustained.

The consolidation was proper. Chapter 38, sec. 114-7 of the Illinois Revised Statutes (1967) states "the court may

order 2 or more charges to be tried together if the offenses and the defendant could have been joined under a single charge." Section 111-4 of Chapter 38 further provides that "Two or more offenses may be charged in the same indictment . . . if the offenses charged . . . are based on the same act or on 2 or more acts which are part of the same comprehensive transaction." The facts in this case indicate clearly that both offenses charged arose out of the "same comprehensive transaction." See: *People* v. *Jennings*, 84 Ill. App. 2d 33, 228 N.E. 2d 566 (1967). Hence there was no error in trying the Petitioner on two separate indictments at the same time where the Petitioner acquiesed in the consolidation of the indictments.

The record exhibits clearly what occurred at the time of consolidation:

> The Court: Is Mr. Bussie objecting to the consolidation?
>
> Mr. Tucker: I have no objection.
>
> The Court: He doesn't want to be tried twice in case he should be freed on the one . . . . (A. 17)

Absent an objection at the outset, the trial court acted properly in consolidating the indictments. Had defense counsel felt that the ends of justice would not be served by consolidation, it was incumbent upon him to resist joinder. He did not do so for reasons which were obviously tactical. He and his client did not desire to run the gauntlet of two separate trials. Their failure to object has repeatedly been held to constitute waiver and bar an attack on consolidation at the appellate level. See *Willis* v. *United States*, 271 F. 2d 477 (D. C. Cir. 1959), where the Court of Appeals stated:

> "At the beginning of the trial the judge could not possibly have foretold that consolidation might eventual-

> ly and erroneously prejudice appellant; only his defense counsel could then have possibly known. Absent an objection at the outset the trial court acted properly in permitting consolidation. The time-saving factor could not be allowed to override the interests of justice if a timely objection had been made, but there was no ocasion to reject the consolidation since trial counsel did not suggest that defendant would be harmed thereby. Appellant cannot now be heard to argue, for the first time, that consolidation was erroneous and prejudicial." 271 F. 2d at 479.

See also: *Peope v. Irvin,* 264 ACA 881, 70 Cal. Rptr. 892 (1968); *People v. Dugan,* 254 Cal. App. 2d 402, 62 Cal. Rptr. 185 (1967); *Ryan* v. *State,* 197 So. 2d 37 (Fla. App. 1967); *State* v. *Baker,* 49 N.J. 103, 228 A. 2d 339 (1967).

Illinois follows the general rule set out in the cases cited above. In *People v. Jennings, supra,* the Court held that where there was no indication that the defendant opposed going to trial on consolidated charges, the failure to object barred review of that question.* The *Jennings* case represents what has always been the law in Illinois concerning consolidation and severance, *People* v. *Woods,* 23 Ill. 2d 471, 179 N.E. 2d 11 (1961), *cert. den.* 370 U.S. 910 (1962); *People v. Williams,* 30 Ill. 2d 166, 195 N.E. 2d (1964); *People v. Levin,* 292 Ill. App. 413, 11 N.E. 2d 224 (1937); *People v. Raymond,* 393 Ill. 147, 63 N.E. 2d 341 (1946).

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*The Court also held that failure of the trial judge to instruct the jury that evidence presented with respect to one of the indictments should not be considered as influencing or controlling with respect to the other indictment was not error where, as here, the defendant offered no instruction relating to the separate indictment. 228 N.E. 2d at 572.

Not only did the Petitioner acquiese in consolidation of the indictments for trial, he never requested that the court instruct the jury to consider the evidence and the consolidated indictments separately. Having never offered such an instruction, he cannot now, for the first time, assign error to the trial courts failure to so instruct. *Willis* v. *United States, supra; People v. Jennings, supra; People v. Rave,* 364 Ill. 72, 3 N.E. 2d 972 (1936).*

This Court is being urged to adopt the unlikely rule that an appellate court must look not only at what occurred but how the court could improve on petitioner's defense. The absurdity of such a contention was noted by Chief Judge Prettyman in *Mitchell* v. *United States,* 259 F. 2d 787 at 793 (D. C. Cir. 1958):

> "It is no part of the judge's function to evaluate the relative efficacy of trial actics. If a trial judge were to understand that after the trial he would in all probability be called upon to determine whether each or any of the trial steps taken by the defense was or was not 'ineffective' his whole attitude toward the conduct of the trial would change. We think this would destroy the concept of an impartial judge, a concept basic to our system."

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*See also: *State* v. *Booth,* 449 P. 2d 107 Wash. 1968); *People* v. *Anderson,* 163 N.E. 2d 793 (Mich. App. 1968); *State* v. *Franklin,* 163 N.W. 2d 437 (Ia. 1968); *State* v. *Lewis,* 165 N.W. 2d 569 (Neb. 1969); *State* v. *Counterman,* 448 P. 2d 96 (Ariz. App. 1968); *Pearsall* v. *State,* 215 So. 2d 58 (Fla. App. 1968).

CONCLUSION

For the reasons set forth above, Respondent requests that the Petition for Writ of Certiorari to the Supreme Court of Illinois be denied.

Respectfully submitted,

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